Supreme Court, U.S.
FILED

02 838 DEC 3 2002

OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

JOHN H. MORLEY, JR.

Petitioner,

V.

GREGORY HARVEY, MARIANNE REGANATO
HEDY NAWALANY and CARMEN MARRONE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

JOHN H. MORLEY, JR.
Petitioner, pro se
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28 pp

QUESTIONS PRESENTED

I. Are candidates for public office federally protected?

II. Did defendants conspire to deprive Morley of his civil right to be a candidate and abuse civil procedure in the process?

PARTIES TO THE PROCEEDING

John H. Morley, Jr. petitioner, pro se is a citizen of Pennsylvania and a past candidate for the office of Pennsylvania Senator.

The respondent Gregory Harvey is a democratic committeeman and an attorney who initiated the underlying state legal action against Morley on behalf of the other respondents, Marianne Reganato, deceased, was a democratic committeewoman and plaintiff in the underlying state action, Hedy Nawalany is a democratic committeewoman and a plaintiff in the underlying state action and Carmen Marrone is a democratic committeeman and plaintiff in the underlying state action.

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STATEMENT OF JURISDICTION

The Third Circuit denied a petition for en banc rehearing on September 4, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C subsection 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ninth Amendment to the United States Constitution states:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

18 U.S.C. subsection 245 **Federally protected activities** includes anyone "qualifying or campaigning as a candidate for elective office".

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On September 20, 2001 Morley filed a complaint in the United States District Court for the Eastern District of Pennsylvania, Case Number 01-CV-4785. Morley alleged that defendants conspired to deprive him of his civil right to be a candidate for the public office of

Pennsylvania State Senator (42 U.S.C. subsections 1983 and 1985) and abused civil proceedings in the process (42 Pa.C.S.A. subsection 8351). On December 17, 2001 the District Court dismissed Morley's Complaint. On August 8, 2002 the United States Court of Appeals for the Third Circuit, Case Number 02-1104 affirmed the dismissal. On September 4, 2002, a Petition for Rehearing was denied.

STATEMENT OF FACTS

On January 25, 2000 Morley filed with the Office of the Secretary of the Commonwealth a Nomination Petition for the office of Senator in the General Assembly for the 1st District ("Office").

On February 1, 2000 Harvey on behalf of Reganato, Nawalany and Marrone filed in the Commonwealth Court of Pennsylvania a Petition to Set Aside Morley's Nomination

Petition. Trial was scheduled for February 14, 2000.

Harvey's Set Aside Petition alleged that Morley's Nomination Petition "fails to satisfy the requirements of the election code,....." and requested the Court to remove Morley's name from the ballot.

On February 2, 2000 Morley purchased one hundred fifty Subpoenas from the Commonwealth for three hundred dollars ($300.00) for use in the defense of his Nomination Petition.

On February 3, 2000 Morley advised Harvey that his Set Aside Petition lacked probable cause.

Between February 3, 2000 and February 8, 2000 Morley spent forty (40) documented man hours of labor to prepare and mail via

certified mail restricted delivery one hundred eighteen (118) original subpoenas, subpoena copy, cover letter, certified mail receipt, return receipt, witness fee check and envelope. Total amount of postage was six hundred seventy six dollars ($676.00).

On February 9, 2000 Morley prepared and mailed via certified mail restricted delivery a Notice to Attend to all three plaintiff's. Total amount of postage was seventeen dollars ($17.00).

Thirteen (13) electors cashed the witness fee check. Total witness fees were seventy eight dollars ($78.00).

On February 10, 2000 Morley rented a bus to transport the subpoenaed electors and invited media to the trial.

On February 11, 2000 Harvey filed a Praecipe to Discontinue with Prejudice.

Harvey believed the Praecipe to Discontinue would preclude Dragonetti Act liability. The Praecipe stated:

> Kindly enter the discontinuance with prejudice of the above captioned Objection to the Nomination Petition of John H. Morley, Jr., by reason of the discovery by counsel for the Objectors that the copy of the Nomination Petition purchased from the Office of the Secretary of the Commonwealth on Friday January 28, 2000 was incomplete and lacked page 2 side 2, page 3 side 1 and page 11 side 1, which circumstance was only discovered on Thursday, February 10, 2000, and which results in the Nomination Petition having a sufficient number of unchallenged signed lines.

The reason Harvey gave to Discontinue was false. Morley's Nomination Petition included six hundred ninety seven (697) signed lines. Harvey objected to two hundred forty (240) signed lines. Only Four hundred fifty seven (457) signed lines remained unchallenged by Harvey. The Election Code requires candidates for

State Senate to file Nomination Petitions with five hundred (500) signed lines. If Harvey's Set Aside Petition had probable cause and was filed for proper purposes Harvey should have proceeded to trial.

697-240=457.

The discovery of missing pages did not cure the alleged deficiencies of Morley's Nomination Petition.

Harvey filed the Set Aside Petition for the purpose of depriving Morley his right to be a candidate, depriving the electors their franchise right to nominate a candidate and to harass Morley.

Harvey discontinued the Set Aside Petition only after learning that Morley had subpoenaed electors and notified members of the media.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The lower federal Courts erred in concluding that Morley's complaint lacked merit and a federal action against defendant Harvey is barred by *res judicata*.

ARGUMENT

A. Morley was invidiously discriminated against when the defendants filed their frivolous Set Aside Petition. For a critical ten (10) day period of only a seventy (70) day primary season Morley was deprived his right to be a candidate when he was forced to spend his time and money defending against the Set Aside Petition instead of campaigning for the primary election.

"Qualifying or campaigning as a candidate for elective office" is a federally protected activity under 18 U.S.C subsection 245. In *Turner v. Fouche* the United States Supreme Court affirmed the federally protected right to

be a candidate when it stated "there is a Federal Constitutional right to be considered for public service without burden of invidiously discriminatory disqualification." In *McKinney v. Kaminsky* a district court further affirmed the federally protected right to be a candidate when they added "the right to seek and hold public office and to engage in political activity is a property right which is protected by the Federal Constitution."

The defendants Set Aside Petition lacked probable cause. The stated reason for the discontinuance did not cure the alleged deficiencies of Morley's Nomination Petition. The defendants filed the Set Aside Petition to deprive Morley the right to be a candidate. Once the Set Aside Petition is filed the defendants

created a winning situation for themselves regardless of the outcome of the litigation. The defendants win if a) the Court removed Morley's name from the ballot or b) Morley keeps his name on the ballot but is forced to spend his time and money defending against the Set Aside Petition instead of campaigning for office.

The defendants in fact a) successfully deprived Morley his right to be a candidate for ten (10) days of the seventy (70) primary season and b) successfully deprived Morley of thousands of dollars that could have been spent advertising his candidacy.

B. The decision conflicts with the United States Supreme Court decisions and this proceeding involves a question of exceptional importance. Are candidates for public office subject to federal protection?

Being a candidate for public office is a federally protected activity confirmed by Supreme Court decisions, see *Turner v. Fouche*. The lower federal Courts in this case have declared that candidates for public office do not enjoy federal protection.

C. Contrary to the District Court Memorandum the defendants are not required to be state actors.

An Illinois district court held that a "private individual may be subject to subsection 1983 liability if individual acted under color of state law by exercising power of virtue of state law and made possible only because wrongdoer was clothed with authority of state law"

see *Copeland v. Northwestern Memorial Hosp.* In this case the defendants were clothed with the authority of the Pennsylvania Election Code that permitted their frivolous Set Aside Petition.

D. Lower federal courts improperly applied *res judicata* to defendant Harvey. Morley's state court action included only one count against the defendants for wrongful use of civil proceedings. Morley's federal action included three counts against the defendants Count I a claim for deprivation of civil rights and Count II conspiracy.

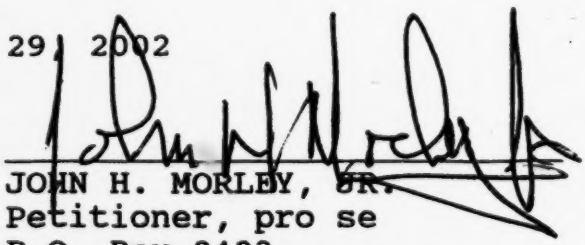
Morley's state court action included only one count for the wrongful use of civil proceedings. Morley's federal action included three counts, Count I for the deprivation of civil rights and Count II for conspiracy. The lower federal courts improperly applied *res judicata* to Counts I and II of the complaint as it applied to defendant Harvey.

Additionally, testimony in the state action confirmed that Harvey composed the complaint first and then recruited plaintiff's. Harvey can not escape liability for abusing civil procedure Count III of the federal complaint.

CONCLUSION

For all of the foregoing reasons, John H. Morley, Jr., petitioner, pro se respectfully requests this Court to reverse the decisions of the lower federal Courts and remand this case, to the District Court, for further proceedings with respect to counts I and II alleged in the Complaint.

DATE: November 29, 2002



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN H. MORLEY, JR.	:	CIVIL ACTION
	:	
v.	:	FILED DEC 17 2001
	:	
GREGORY HARVEY	:	
MARIANNE REGANATO	:	
HEDY NAWALANY	:	
CARMEN MARRONE	:	NO. 01-4785

MEMORANDUM AND ORDER

Fullam, Sr. J. December 17, 2001

The *pro se* plaintiff, John H. Morley, Jr., sought Democratic nomination for the office of State Senator in the First Senatorial District in Philadelphia, at the May 2000 primary election. In pursuit of that goal, plaintiff duly filed with the Secretary of the Commonwealth his nominating petitions, on or about January 25, 2000.

The defendant Gregory Harvey is an attorney who, on behalf of his clients, the remaining defendants (Maryanne Reganato, Hedy Nawalany and Carmen

Marrone) filed a petition challenging the validity of plaintiff's nomination papers. The petition asserted, with great supporting detail, that plaintiffs petition did not contain the requisite 500 signatures of electors residing within the senatorial district who were registered to vote in the Democratic primary. The challenge was filed on February 1, 2000. On February 3, 2000 wrote a letter to Mr. Harvey, confirming a telephone conversation of the same date, in which Mr. Harvey agreed that it would not be necessary for plaintiff to subpoena the three objectors for the upcoming hearing on the challenge. In the same letter plaintiff asserted that three of the challenged signatures in the petition were indeed valid signature, and suggested that

Mr. Harvey re-check the matter, and withdraw those specific objections.

A hearing on the defendant's challenge was scheduled to take place in Harrisburg on February 14, 2000. On February 11, 2000, however, Mr. Harvey filed a "Praecipe to Discontinue with prejudice," withdrawing the objections to plaintiff's nomination papers. The stated reason for the defendants' change of position was that the copy of plaintiff's nominating petition which had been purchased from the Secretary of the commonwealth was not, as it turned out, a complete copy, unbeknownst to the defendants' omitted several pages of signatures. Upon discovering this error, on February 10, 2000, defendants were satisfied that, notwithstanding the allegedly invalid signatures, plaintiff's

nominating petition contained more than enough valid signatures.

Plaintiff thereupon sued the defendants in the Court of Common Pleas of Philadelphia County, (January Term 2001,No. 4734),seeking damages for alleged misuse of civil process.Plaintiff alleged that he had expended large sums of money in preparation for the February 14th hearing, including sums spent for obtaining, preparing,and issuing 118 subpoenas, and renting a bus to transport his witnesses, together with representatives of the media, to Harrisburg for the hearing.

In that action, Mr.Harvey's preliminary objections to the complaint were sustained and as to him, plaintiff's complaint was dismissed, without leave to amend. The action remains pending in the

Court of Common Pleas as to the other three defendants.

It is immediately apparent that, as to the defendant Harvey, this action must be dismissed with prejudice. The claims asserted here could have been asserted in common pleas action; that action has been terminated in Mr. Harvey's favor; and this lawsuit is barred by the doctrine of claim preclusion.

Even if that were not the case, it is clear that plaintiff does not have valid federal claims against any of the defendants. None of the defendants deprived plaintiff of his constitutional right to become a candidate - his name was on the ballot, and he did indeed become a candidate. If the defendants had pressed their state court challenge to his

nomination petition to a successful conclusion, plaintiff would have been deprived of candidacy, not because of any constitutional violation, but because the defendants would have successfully exercised their own constitutional rights of access to the judicial system. Any infirmities in their conduct of the state court litigation (e.g., bad faith, lack of probable cause, etc.) would be a matter for state courts to resolve.

To the extent that plaintiff's complaint in this action asserts claims based upon state law, against the defendants other than Mr. Harvey, I decline to exercise supplemental jurisdiction, for obvious reasons: All federal claims in this case have been dismissed, and the remaining disputes, if

any, belong in state court. And, indeed, those same claims are now pending before the Court of Common Pleas of Philadelphia County, with whose jurisdiction this Court plainly should not interfere, in any event.

To summarize, all claims against the defendant Gregory Harvey must be dismissed, both because barred by res judicata/claim preclusion, and because the claims lack merit. All federal claims against all of the defendants must be dismissed, because it is apparent from the face of the complaint that plaintiff's constitutional rights have not been violated in any respect. It also appears that none of the defendants was a state actor. And, with respect to the state-law claims against the defendants other than Mr. Harvey, the complaint will be

dismissed without prejudice, for lack of jurisdiction.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN H. MORLEY, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
GREGORY HARVEY	:	
MARIANNE REGANATO	:	
HEDY NAWALANY	:	
CARMEN MARRONE	:	NO. 01-4785

ORDER

AND NOW, this 17th day of December 2001, upon consideration of defendants' Motion to Dismiss and plaintiff's response, IT IS ORDERED:

1. Counts I and II of the plaintiff's complaint are DISMISSED WITH PREJUDICE as to all defendants.

2. Count III of plaintiff's complaint is DISMISSED WITH PREJUDICE as to defendant Gregory M. Harvey.

3. Count III of plaintiff's complaint is DISMISSED WITHOUT PREJUDICE, as defendants Reganato, Nawalany and Marrone, for lack of Jurisdiction.

/s/ John P. Fullam
JOHN P. FULLAM, SR. J.

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

NO. 02-1104

JOHN H. MORLEY, JR.,

Appellant

v.

GREGORY HARVEY; MARIANNE REGANATO; HEDY NAWALANY; CARMEN MARRONE

On Appeal From the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 01-cv-04785)
District Judge: Honorable John P. Fullam

Submitted Under Third Circuit LAR 34.1(a)
August 1, 2002

Before: SLOVITER, AMBRO and WEIS CIRCUIT JUDGES

(Filed August 8,2002)

OPINION

PER CURIAM

Appellant John Morley, proceeding pro se, appeals an order of the United States District Court for the Eastern District of Pennsylvania granting Appellees' motion to dismiss his civil rights complaint. For the reasons that follow, we shall affirm.

Morley avers in his complaint that on January 25, 2000, he filed a Nomination Petition with the Office of the Secretary of the Commonwealth of Pennsylvania as a candidate for Senator in the General Assembly in the 2000 Democratic primary election. On February 1, 2000, Appellees Marianne Reganato, Hedy Nawalany and Carmen Marrone filed a Petition to Set Aside Nomination Petition pursuant to 25 Pa. Stat. sub section 2937, alleging that Morley failed to obtain the 500 valid signatures of registered and enrolled electors needed to place his name on the

ballot under Pennsylvania's Election Code 25 Pa. Stat. sub section 2872.1. Appellee Gregory Harvey, who filed the petition to Set Aside, is counsel for Reganato, Nawalany and Marrone.

On February 11, 2000, three days before the scheduled hearing on the Petition to Set Aside, Harvey filed a Praecipe to Discontinue With Prejudice and withdrew the challenge to Morley's Nomination Petition. The Praecipe states that Harvey discovered that the copy of the Nomination Petition purchased from the Office of the Secretary of the Commonwealth was missing pages and that the complete Nomination Petition reflects that Morley has enough signatures to have his name placed on the ballot.

Morley alleges that the reason stated in the Praecipe for withdrawing the

challenge is false. He states that his Nomination Petition had 700 signatures and the Petition to Set Aside challenged the validity of 240 signatures. With only 460 signatures unchallenged, Morley contends that the discovery of missing pages did not cure the alleged deficiencies. He believes that Harvey discontinued the matter because he learned that Morley had subpoenaed electors to appear at the hearing and because he knew that his challenge would fail.

Morley claims that the Appellees attempted, and conspired, to deprive him of his right to be a candidate for public office, and the electors of their right to nominate a candidate, in violation of 42 U.S.C. sub sections 1983, 1985. He also asserts a state law claim of wrongful use of civil proceedings. Morley seeks

compensatory damages for the costs he incurred in preparing for the hearing, interest and punitive damages.

The Appellees filed a motion to dismiss Morley's complaint which the District Court granted. The District Court found the claims against Harvey barred by the doctrine of claim preclusion based upon a similar lawsuit Morley filed in state court which was dismissed as to Harvey. It further found that Morley has no valid federal claims against any of the Appellees and that the Appellees are not state actors. The District Court declined to exercise supplemental jurisdiction over Morley's state law claims against Reganato, Nawalany and Marrone, which were also pending in state court. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. sub section 1291. 1

A prima facia case under sub section 1983 requires a plaintiff to show that: (1) a person

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1 Our standard of review is plenary. Children's Seashore House v. Waldman, 197 F.3d 654, 658 (3d Cir.1999). We must consider all factual allegations pled in the complaint as true and can affirm the District Court's order only if we are certain that Morley cannot prove any set of facts in support of his claim that would entitle him to relief. id.

deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law. Groman v. Township of Michigan, 47 F.3d 628, 633 (3d Cir. 1995). Morley argues that appellees deprived him of his right to be a candidate for ten days, while the Petition to Set Aside was pending, and deprived him of funds that could have been spent on his campaign instead of defending Appellees' petition. A loss of time and money, however, will

always occur when a Nomination Petition is challenged. While Morley does not challenge the validity of the Election Code provision under which Appellees brought their Petition to Set Aside, states have a right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983). The District Court properly concluded that the Appellees did not deprive Morley of a federal right by challenging whether he obtained the signatures needed to appear on the ballot under Pennsylvania's Election Code and then with drawing that challenge. Morley does not state a claim under sub section 1983 or a related conspiracy claim under sub section 1985. 2

Having no federal claims before it the District Court did not err in declining to exercise supplemental jurisdiction over Morley's state law claims against Reganato, Nawalany and Marrone. See 28 U.S.C. sub section 1367(c). The District Court also properly

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2 Morley's reliance on 18 U.S.C. sub section 245 is misplaced. This statute provides for criminal penalties where one, by force or threat of force, interferes with a person because he is qualifying or campaigning as a candidate for elected office. In addition, having found no deprivation of a federal right, we need not address whether Morley sufficiently alleged that the Appellees acted under color of state law.

dismissed the state law claim against Harvey based upon the doctrine of claim preclusion. Other than the absence of the federal claims Morley's state court complaint is virtually identical to the

federal complaint and the state court sustained Harvey's preliminary objections. See Gregory v. Chehi, 843 F.2d 111 115 (3d Cir. 1988)(applying Pennsylvania state law on claim preclusion in sub section 1983 action). Although Morley argues that claim preclusion does not apply because he will appeal the state court's ruling, this argument lacks merit. See Shaffer v. Smith, 673 A.2d 872, 874 (Pa. 1996) (stating that judgement is deemed final for purposes of res judicata "unless or until it is reversed on appeal").

Accordingly, we shall affirm.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 02-1104

JOHN H. MORLEY, JR.

Appellant

v.

GREGORY HARVEY; MARIANNE REGANATO; HEDY NAWALANY; CARMEN MARRONE

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES and WEIS*, Circuit Judges

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SUR PETITION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges inactive service, and no judge who concurred in the decision having asked for rehearing, and a majority of circuit judges of the circuit in regular

active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro
CIRCUIT JUDGE

Dated: September 4, 2002

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* Senior Judge Weis, who sat on the original panel, is limited to panel rehearing only.